Filed 11/30/16 Ripley v. Ripley CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KATHLEEN RIPLEY,

Plaintiff and Respondent,

v.

LYNDA LUCILLE RIPLEY,

Defendant and Appellant.

F071550

(Stanislaus Super. Ct. No. FL 692543)

OPINION

APPEAL from an order of the Superior Court of Stanislaus County. Jack M. Jacobsen, Judge.

Thomas Ogden for Defendant and Appellant.

Jeanette M. Sereno for Plaintiff and Respondent.

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INTRODUCTION

The trial court suspended appellant Lynda Lucille Ripley's court-ordered visitation of her eight-year-old granddaughter K.R. amid substantiated allegations that the man she lived with had sexually molested K.R.

No court reporter was present at the evidentiary hearing leading to the order suspending Lynda's visitation. Lynda initially sought a settled statement (see Cal. Rules of Court, rule 8.137), but failed to appear for the court hearing on the matter. Consequently, no settled statement was certified by the trial judge.

On appeal, Lynda does not challenge the substance of the trial court's decision. Instead, her sole contention is that the Stanislaus Superior Court violated California Rules of Court concerning notice of availability of court reporters. (See Cal. Rules of Court, rule 2.956.) She contends that as a result of that alleged violation, this court should grant her a new evidentiary hearing.

We conclude that because Lynda did not raise this issue below, she cannot do so for the first time on appeal. We affirm the order suspending her court-ordered visitation in its entirety.

FACTS[1]

Guardianship

In January 2008, the superior court appointed appellant Lynda Lucille Ripley[2] to be the guardian of K.R., who was one year old at the time. Lynda is K.R.'s maternal grandmother. K.R.'s mother, respondent Kathleen Ripley, petitioned the court to terminate the guardianship in 2009 and again in 2011.

Termination of Guardianship

On October 17, 2012, the superior court granted Kathleen's request to terminate the guardianship. However, the court ordered that Lynda would have visitation with K.R. for two weekends per month, every Wednesday after school for several hours, and 21 days of uninterrupted time.

The court found that "mother and [K.R.] have an excellent loving relationship. Mother has a stable home environment for the last several years. She has adequate financial resources and a suitable residence. She continued to live a law abiding, sober, and drug free life."

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[1] The facts below are taken from the trial court's statement of decision on Mother's request to suspend Lynda's visitation.

[2] Because appellant and respondent share a last name, we will refer to appellant by her first name and to respondent as "Mother" or by her first name.

The court observed that K.R. had a stable and loving relationship with Lynda, but the court had "concerns" about her "parenting decisions." Lynda resisted Kathleen's return to K.R.'s life and failed to share information regarding K.R.'s health issues. There was evidence Lynda also spoke negatively about Kathleen in K.R.'s presence.

Initiation of Proceedings at Issue

On March 13, 2014, when K.R. was seven years old, Kathleen filed a request for an order to terminate grandmother's visitation. Kathleen alleged that K.R. had drawn pictures that led her to believe K.R. had been molested by a man named Peter Mendes (Mendes). Lynda lives at Mendes's home. Testimony at a later hearing would establish that Lynda had been married to Mendes, but the marriage had been annulled 9 or 10 years earlier. K.R. told Mother that Mendes sleeps in K.R.'s bed with her at night.

Court Proceedings

Based on Mother's allegations, the court temporarily suspended K.R.'s visitations with Lynda pending a hearing.

The parties met with a child custody counselor on April 10, 2014. The court followed the counselor's recommendations and ordered that K.R. have no contact with Mendes; that Lynda was permitted supervised visitation at a child and family services provider called Sierra Vista; that K.R. continue to see a therapist; and that all parties cooperate with law enforcement and Child Protective Services (CPS).

After a hearing on June 19, 2014, the court continued its prior orders and additionally ordered Lynda to meet with K.R.'s therapist about her relationship with K.R.

Another hearing occurred on October 1, 2014. The counselor indicated it had received feedback from K.R.'s therapist, and that CPS had substantiated the allegations of sexual molestation by Mendes. The court suspended Lynda's visitation and set a further review hearing to receive updated information from K.R.'s therapist.

Evidentiary Hearing

The parties presented evidence at an evidentiary hearing on February 2, 2015. No court reporter was present at the hearing.

CPS Social Worker ‘s Testimony

A social worker with CPS stated that CPS considered the allegations that Mendes had sexually molested K.R. to be substantiated.

The social worker said Mendes initially agreed to meet with her. Later, however, his attorney contacted her. The social worker told Mendes and his attorney that she needed their explicit permission to meet. The social worker left several messages informing Mendes that if he did not agree to speak, “a decision would be made without his input.” Mendes never returned the social worker’s calls.

Sierra Vista Supervisor’s Testimony

A supervisor at Sierra Vista said that during visits, Lynda would refer to herself as K.R.’s “mother.” At one visit, Lynda brought 17 photographs of K.R. with Mendes. The supervisor said that overall, however, Lynda acted appropriately during visits.

Susan Diamond’s Testimony

K.R.’s therapist, Susan Diamond (Diamond), said that K.R. would refer to Lynda as “mother.” K.R. reported having nightmares. K.R. also indicated “she was sleeping with Mr. Mendes and that he would bath[e] her.” However, K.R. denied any inappropriate touching.

Diamond reviewed the pictures K.R. had drawn. K.R. denied drawing the pictures, then later said she drew what a neighbor child had told her to draw. Diamond indicated it was her opinion that the drawings were consistent with sexual contact. Diamond said it was unusual for seven-year-old children to write about sexual contact. Though K.R. denied such contact, Diamond believed she was being “pressured not to disclose” it. As a mandated reporter, Diamond contacted CPS.

Since visitation with Lynda had ceased, K.R. stopped having nightmares.

Diamond also believed Lynda had been attempting to sabotage K.R.'s relationship with her mother. Lynda also set "unhealthy boundaries" by allowing K.R. to sleep with Mendes. Diamond concluded that K.R. was not in a safe environment while in Lynda's residence.

Mother's Testimony

At the hearing, Mother requested that Lynda have no visitation with K.R.

Mother said that she recognized the writing on the drawings as K.R.'s. Mother stated that when K.R. returned to mother's custody, she did not want to sleep alone.

Mother discovered a second set of drawings in K.R.'s backpack. K.R. said they were not hers, but mother recognized K.R.'s writing.

Since October 2014, when visitations with Lynda ceased, K.R. "listens better, eats better and is doing better in school by making friends and having less inappropriate behavior."

Lynda Ripley's Testimony

Lynda testified that, on occasion, Mendes would lie on top of the covers with K.R. until she fell asleep. However, Lynda denied that Mendes would sleep under the covers with K.R. Lynda does not believe Mendes molested K.R.

Lynda said that she does not insist K.R. call her "mother." Lynda also said she never makes negative comments about Mother in K.R.'s presence.

Court's Ruling

The court ruled that Mother met her burden of showing significant change in circumstances warranting a modification, and ordered that Lynda's visitation and contact with K.R. be suspended. Mother had presented Diamond's unrebutted expert opinion that Mendes had sexually abused K.R. The court noted that a similar conclusion had been reached by CPS. The court concluded that Lynda's "failure to assure a safe environment while [K.R.] is in her care, justifies the Court suspending visitation at this time."

The court found that Lynda's statements "appear[ed] to be manipulating" K.R.

The court also referenced a prior decision in which it had determined that Lynda had failed "to promptly attend to [K.R.]'s medical and dental needs."

The court observed:

> "The evidence is uncertain as to whether visitation can resume in the foreseeable future. Any consideration of such visitation would have to be with the approval of [K.R.]'s therapist. Any future visitation would have to contain a provision that Peter Mendes not have any contact with [K.R.]"

Post-Hearing Proceedings

Lynda filed a notice of appeal on April 6, 2015. Since no court reporter was present at the February 2015 evidentiary hearing, Lynda elected to proceed agreed or settlement statement. On April 10, 2015, Lynda applied for permission to prepare a settlement statement. On April 13, 2015, the trial court granted Lynda's request for a settlement statement. The order stated that Lynda's request was granted, and that she must "follow the procedure set forth in California Rules of Court, rule 8.137 (b) in preparing the settled statement."

On May 13, 2015, Lynda filed a proposed settled statement. Mother filed a response indicating that Lynda's proposed settled statement "appears, excepting for errors and omissions, to be a word-for-word transcription of the Court's February 10, 2014 *Tentative Decision*, now *Statement of Decision*'s recitation of the evidence and testimony…." Mother's response also noted that because the proposed settled statement describes less than all of the testimony, Lynda was required to state the points to be raised on appeal pursuant to California Rules of Court, rule 8.137(b)(2)), yet failed to do so.

In a May 26, 2015, order, the trial court set a hearing for June 3, 2015, at 9:00 a.m. to address the proposed settled statement.[3] On June 3, 2015, Lynda filed an amended

[3] The order actually said the hearing was being set to address "proposed settlement." It seems clear that this should have read: "proposed settled statement."

proposed settled statement. However, neither Lynda nor her counsel appeared at the 9:00 a.m. hearing. The court called Lynda's counsel at 9:37 a.m., but there was no answer. The court denied Lynda's request for a settled statement on the grounds that (1) she failed to appear at the hearing, and (2) she failed to comply with California Rules of Court, rule 8.137(b)(2).

DISCUSSION

On appeal, Lynda states that she is not appealing the substance of the trial court's decision revoking her visitation. Instead, her sole contention is that the February 2015 hearing violated the California Rules of Court concerning notice of court reporter availability. Specifically, she contends the Stanislaus Superior Court failed to comply with California Rules of Court, rule 2.956.

California Rules of Court, rule 2.956 requires trial courts to adopt a policy specifying which court departments normally provide court reporters and which do not. (Cal. Rules of Court, rule 2.956(b)(1).) The court must post the policy in the clerk's office (*ibid*.) and either publish the policy in a newspaper, send a copy of the policy to each party 10 days before any hearing is held, or adopt the policy as a local rule.[4] (Cal. Rules of Court, rule 2.956(b)(2).) Lynda asserts the superior court did not comply with the requirements of California Rules of Court, rule 2.956 and, as a result, she was

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[4] Lynda requests that we take judicial notice of the Stanislaus County Superior Court's local rules, along with the register of actions in this case, and the trial court's February 2, 2015, minute order taking the visitation suspension issue under submission. Mother opposes the requests.

We conclude the register of actions is not material to the resolution of this appeal and deny the request that we judicially notice it. We grant the request to judicially notice the February 2, 2015, minute order.

We decline to judicially notice the Stanislaus County Superior Court Local Rules attached to Lynda's request. Lynda requests we take judicial notice of the local rules with "[r]evisions effective July 1, 2014." However, Mother has shown by competent evidence that the local rules were updated after July 1, 2014, before the February 2015 hearing.

"effectively denied her due process as she was entitled to proper notification regarding whether a reporter would be at her hearings."

We find that this contention is not cognizable on appeal because Lynda failed to raise it below.[5]

> " ' " 'An appellate court will ordinarily not consider procedural defects … in connection with relief sought … where an objection could have been but was not presented to the [trial] court by some appropriate method .... The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver .... Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* ....' [Citation.]" [Citations.]
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> " 'Moreover, it would be inappropriate to allow a party not to object to an error of which the party is or should be aware, " 'thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.' [Citation.]" [Citation.]' " (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 755, original italics.)

There is no indication the trial court ever ruled on Lynda's present assertion that California Rules of Court, rule 2.956 had been violated. Neither the minute order nor the trial court's statement of decision reflect any objections on the court reporter issue. !(CT 9-24)! It is Lynda's burden, as the appellant, to demonstrate she properly preserved her objection in the trial court. (See *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799–800.) Consequently, because there is nothing for us to review, we must affirm the order.

Moreover, even if the superior court had failed to adhere to California Rules of Court, rule 2.956, and Lynda was wrongfully deprived of notice that a reporter would not be present at the evidentiary hearing, we would not find such an error prejudicial.[6] Even if Lynda and her counsel did not receive due notice of the lack of a court reporter, they

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[5] Respondent argued in its appellate brief that Lynda's contention was foreclosed for failure to raise it below.

[6] Consequently, we do not determine whether the superior court erred.

surely knew or should have known no court reporter was present once they arrived at the hearing. At that point, any prejudice from the lack of prehearing notice was negated by actual or constructive notice that the hearing was not being transcribed.

Additionally, Lynda argues that the "fundamental issue in this matter is there is no reporter['s] transcript to provide the Court. [Lynda] had no means of presenting an effective appeal without it …." That is incorrect. Lynda did have a means of presenting an effective appeal without a reporter's transcript: obtaining a settled statement pursuant to California Rules of Court, rule 8.137. She did not fully avail herself of that opportunity because she failed to appear at the hearing on the proposed settled statement.[7]

DISPOSITION

The trial court's February 10, 2015, order is affirmed. Respondent shall recover costs on appeal.

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POOCHIGIAN, J.

WE CONCUR:

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KANE, Acting P.J.

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FRANSON, J.

[7] Additionally, she did not comply with the California Rules of Court, rule 8.137(b)(2), which requires that when the settled statement's "condensed narrative describes less than all the testimony, the appellant must state the points to be raised on appeal …." (Cal. Rules of Court, rule 8.137(b)(2).)